into a promise, though her very existence was at the time of her doing so unknown to them. In the case of contracts made by correspondence, our courts have laid down the rule that the posting of a letter of acceptance is a complete acceptance, even if the letter is lost in the post. It follows that a revocation will be inoperative if it does not reach the acceptor before his acceptance is posted.

6. The Statute of Frauds.—Contracts other than those by record or under seal are commonly called simple or parol contracts. The latter phrase, meaning "oral," was used in contradistinction to contracts under seal, inasmuch as our early law paid no attention to writing unless it was authenticated by seal. The Statute of Frauds, 1677 (sections 4 and 17), however, imposed on a number of simple contracts a requirement that the contracts themselves, or some note or memorandum thereof, should be in writing signed by the "party to be charged" or his agent. The contracts for which writing is required are still a division of simple or parol contracts, and compliance with the requirements of the statute does not dispense with the necessity for consideration. Moreover, the statute does not affect the formation of the contract, but only prescribes that it shall not be proved except by certain evidence. An oral con-

tract falling within the Act is a valid contract, and if a signed note or memorandum of it is afterwards made, it will become enforceable. If the "party to be charged" (the defendant) has signed, it is immaterial that the other party has not signed. The object of the Act was to put a stop to "frauds and perjuries," which, it was feared, would become common in consequence of the recognition—at that time still comparatively recent—of the enforceability of informal contracts; but it may be doubted whether the encouragement which it has given to bad faith is not a greater evil. It has certainly given rise to an enormous amount of litigation. The courts have so interpreted it as to restrict its operation as much as possible, and in so doing have at times done some violence to its provisions. The contracts included in the 4th section are (1) contracts by an executor or administrator to pay the liabilities of the deceased out of his own estate—an unimportant class, since the absence of consideration will in most cases make the promise of no effect; (2) contracts of guarantee; (3) agreements made in consideration of marriage—meaning agreements to pay money or settle property upon marriage: a promise to marry, for which the consideration is the corresponding promise of the other party, is

not within the statute, though it is subject to a rule which requires the evidence of a plaintiff who sues upon such a contract to be corroborated by writing or some other material evidence; (4) contracts relating to interests in land; (5) agreements not to be performed within a year from the making thereof. The Court of Chancery nullified the effect of the statute in some cases which fell within its jurisdiction to grant specific performance (*e.g.* in cases of contracts for the sale of land), by holding that where there had been a part performance, as by giving and taking possession, a contract might be specifically enforced even in the absence of writing. The scope of the provision as to agreements not to be performed within a year has been much restricted, by excluding from it contracts which were completely performed on one side within the year, and contracts for an indefinite period, such as for life, which might terminate within the year. The 17th section (now incorporated in the Sale of Goods Act, 1893), which required writing for contracts for the sale of goods of the value of £10 or upwards, contained an exception in cases where the buyer accepted and received the goods, or part of them, or had made some payment. Here "acceptance" was judicially interpreted, and is now defined by statute to mean, "any act in relation to

the goods which recognises a pre-existing contract of sale," so that for this purpose an examination of the goods, followed by a rejection under the belief that they are not up to sample, may amount to an acceptance.

7. MISTAKE.—The cases in which mere mistake has any effect upon the validity of a contract are comparatively few—fewer probably than in most other systems of law. In the case of a sale, for instance, we do not attempt to make any distinction between a mistake as to quality and a mistake as to substance. A person who has bought a specific piece of plate cannot avoid his bargain because he believed it to be of old workmanship when in truth it was modern, or gold when it was really silver-gilt. It makes no difference even that the seller knew of his mistake, so long as he did nothing to cause or confirm it. If, however, the buyer thought not merely that the thing was different from what it really was, but that the seller was undertaking that it had some quality which it had not, and the seller knew of his mistake, he cannot hold him to his bargain.[1]

[1] Of course if the seller promises an article of a certain kind and supplies one of a different kind, the purchaser need not accept it; but here there is no mistake but a default in performance. The contract holds good, and the purchaser can recover damages for the default.

Somewhat similar is the converse case, where a man offers more than he means to offer (as by a mistake in writing figures), and the other party accepts the offer knowing that it has been made by mistake. The most important cases in which the mistake of one party will make a contract void are where there is a mistake as to the whole nature of the transaction (as when a man signs a bill of exchange believing that he is signing a guarantee, or that he is signing merely as a witness), and where there is a mistake as to the identity of the other party (as when an order for goods is sent, to which the sender has forged the name of another). Such cases can hardly arise except through fraud; but whereas a fraud in itself does no more than give the person deceived the right to avoid the contract—a right which cannot be exercised against an innocent third person who has acquired ownership under it for value—a mistake of the kind mentioned is held to prevent the formation of any contract at all, so that even innocent third persons can acquire no rights. Thus in the case of the forged order the seller could recover the goods even from an innocent person who had purchased from the forger; if the goods had been obtained by a false representation—say as to the credit or solvency

of the buyer—the innocent purchaser from him would have been safe.

A mistake common to both parties as to the existence of what is contracted for—*e.g.* a sale of a life policy or of an annuity, when the life in question has already ceased—will make the contract void, and what has been paid under it may be recovered. Where there are two things which equally answer the description of the thing contracted for—two ships, for instance, have the same name—and each party is thinking of a different one, it has been held that there is no contract. It is possible, but not clear, that the same would be held when a thing is sufficiently described by the one party, but the other makes a mistake as to what is intended—*e.g.* at a sale by auction a man through deafness bids for one lot thinking that another is being offered.

8. Misrepresentation and Fraud.—A misrepresentation made by one person to another with the purpose and effect of inducing him to enter into a contract with the former will entitle the latter to avoid the contract, if it is a misrepresentation as to some material fact, such as the quality of goods to be sold, the character or credit of a person to be dealt with. A statement of opinion or intention is not and does not become a misrepresentation because the

opinion turns out to be mistaken or the intention is not carried out; but the existence of the opinion or intention is a matter of fact, and a false representation that it exists may well be a material misrepresentation. If a representation is not merely false, but is known to be so to the person who makes it, or is made by him recklessly without knowing or caring whether it be true or false, it is called fraud or deceit. For the mere purpose of giving a right to avoidance of the contract it makes little difference whether a misrepresentation is innocent or fraudulent, save that it will be harder to resist the inference that a fraudulent misrepresentation was made for the purpose of inducing the contract. Where, however, a transaction has been completed by conveyance, it appears settled that an innocent representation will not, while a fraudulent one will, give a right to have it set aside.

In general there is no duty requiring a party to any intended contract to make a disclosure to the other of material facts which might affect his judgment. But there are special kinds of contract (*uberrimæ fidei*)—notably contracts of insurance—in which the facts are usually so much more within the knowledge of one party, that the law imposes on him the duty of disclosure, and gives the other a right to avoidance if the duty is not

discharged. In contracts for the sale of land or goods, the vendor is bound to give a good title, subject to such exceptions as may be provided for by the conditions of sale; and the existence of an undisclosed defect in the title may give the purchaser a right to repudiate, though rather as a breach of the seller's duty under the contract than as a failure in a duty antecedent to it. The same is true of the conditions as to merchantable quality and fitness which, in certain circumstances, are implied in a sale of goods.

Duress and undue influence have effects similar to that of fraud: the former consists in actual or threatened violence or imprisonment inflicted by the one party on the other or members of his family, the latter of an unconscientious use of power arising out of confidential relations (like those of parent and child or solicitor and client), or out of special circumstances which put one party in a position of great disadvantage towards the other.

The right to avoid a contract, and even a transaction completed by conveyance, on any of the grounds above mentioned, is subject to the rights acquired by third persons for value and in good faith, and to the possibility that the right of avoidance may be lost by a positive confirmation

of the transaction, or by acquiescence in it after the cause which induced it has ceased to operate.

9. ILLEGALITY.—It is obvious that no system of law could enforce a promise to commit acts, such as crimes or even civil wrongs, which are contrary to law. The same is true of contracts for the commission of acts, such as sexual immorality, which the law seeks to discourage, though it does not punish. Contracts of these kinds are said to be void for illegality, and the invalidity extends to the whole contract, including the counter-promise of acts innocent in themselves, such as a promise of payment, for which the illegal or immoral act or the promise of it forms the consideration. But the term illegality as applied to contracts has a wider scope in its application to contracts which the law holds void, not because what is promised is illegal or immoral, but because in some cases it is contrary to the policy of the law that a person should be bound to observe his promise. It is not illegal or immoral for a man to refrain from trading in any part of the United Kingdom or to cease to trade at all; but it is contrary to public policy that he should bind himself to abstain from trading either generally or within limits wider than are reasonable under the circumstances, and a

contract in general or unreasonable restraint of trade will be held void. It would be an unreasonable restraint if an Oxford grocer, on selling his business, undertook to carry on no similar business within a radius of 150 miles. It has been held not unreasonable for a manufacturer of munitions of war, upon selling his undertaking, to agree not to carry on certain classes of business in any part of the world. It is not illegal or immoral to pay money lost on a wager; but the practice of making wagers is discouraged by statutes which allow no action to be brought upon any wagering contract. Second marriages are neither illegal nor immoral; but a promise by a married man to marry another, if his present marriage should be terminated, is void. So, again, a man may lawfully commit the custody of his children to another; but he cannot bind himself not to resume the control or fetter his liberty of deciding as to their religious education.

Where property has been transferred or money paid under an illegal contract, the law will in general give no assistance to a party who seeks to recover it. Bets once paid cannot be got back. A conveyance of property by way of settlement on a woman with whom the settlor had gone through the ceremony of marriage—the marriage being

void under the law which formerly prohibited marriages with a deceased wife's sister—could not be set aside at the suit of his representatives after his death. But the same rule is not applied where money has been deposited with a stake-holder to abide the result of a wager: the depositor, who has lost, may reclaim his deposit at any time before it has been paid over to the winner. Nor is the rule applied where the illegal purpose has as yet been in no way carried out (as in the case of a transfer of property with a view to defrauding creditors), or where the party who claims to recover is the less guilty of the two (such as a woman who paid money to a matrimonial agency, in return for which she had obtained introductions to possible suitors).

10. Limits and Extensions of Contractual Rights and Duties.—The rights and duties under a contract are, in the first instance, limited to the parties to it. If A promises a sum of money to B, no one but A is liable, and no one but B can claim. Even if the promise is made by A to B that A will pay C, C acquires no rights; the fact that C would benefit if the contract were performed will not alter the situation. So if a landlord promises his tenant to repair the house, and for default of repair a visitor to the house is

injured, the latter will have no claim against the landlord. But this limited operation of contract may be extended in various ways. We have already seen that a contract made by an agent may place the principal in the same position as if he had himself made the contract. So, too, rights under a contract, in so far as they are not of too personal a nature, may form the subject of an assignment or trust which will enable the assignee or beneficiary to enforce them. Such rights and the corresponding obligations will also pass upon the death of a contracting party to his representatives.

The benefit and burden of covenants which "touch and concern" land are in many cases treated as annexed to proprietary interests in the land, and pass or "run" with them. The application of this principle to the covenants in leases has already been mentioned.[1] In the case of sales of land the benefit of the vendor's covenants for title "runs" with the land purchased. So, too, the benefit of covenants, and even of less formal agreements, between adjacent owners relating to the erection of buildings or the use of land may pass with the land for the benefit of which they are entered into. The burden of such covenants or agreements will,

[1] See p. 136.

however, bind a subsequent owner only if the obligation is negative—*e.g.* a covenant *not* to build a house worth less than £1000, but not a covenant to build a house of that value—and even so it will not bind a purchaser for value who at the time of his purchase had no notice of the obligation.

11. NEGOTIABLE INSTRUMENTS.—Negotiable instruments, which include bills of exchange, cheques, and promissory notes, were transferable by the custom of merchants, and their transferability has long been recognised by our courts. To take the most familiar example, a cheque is an order for payment of money on demand, drawn on a banker, and expressed to be payable either to bearer or to a named person or his order. As between the drawer and the payee it is a promise by the former to pay money to the latter. If it is payable to bearer, the rights of the holder may be transferred by him by merely handing over the cheque. If payable to order, the payee can transfer his rights only by indorsement, *i.e.* by signing his name on the back. If he so signs without more, the indorsement is said to be in blank, and the cheque becomes payable to bearer. He may, however, make a special indorsement, *i.e.* order payment to some other named person, who must again indorse. When a cheque is transferred, whether

by delivery or indorsement, it is said to be negotiated, and negotiation is a kind of transfer which differs in important respects from the ordinary assignment of a contractual right. In the first place, any holder of a cheque to bearer—even a thief—can give a good title to one who takes from him for value and in good faith; it passes like money. In the second place, a transfer by indorsement gives a good title to the indorsee who takes in good faith and for value, free from any defences on the ground of fraud, duress, or illegality, which might have been available against the indorser, except that a holder who is shown to have been a party to such fraud, duress, or illegality cannot recover. Further, we may notice that the rule as to consideration receives considerable modification in respect to negotiable instruments. A cheque given gratuitously, it is true, creates no rights between the drawer and the payee if the former can prove the absence of consideration. But a subsequent holder who has given value for it is in as good a position as if value had been given by the original payee, and a gratuitous transferee from the holder for value is in an equally good position. It may thus come about that a holder who has given nothing for a cheque can successfully sue a drawer who has received nothing: it is sufficient that once

in the cheque's career value has been given. It is presumed in favour of a holder in due course that value has been given; but if once it is shown that the drawing or negotiation has been affected by fraud, duress, or illegality, the burden of proof is reversed, until it is shown that subsequently value has in good faith been given.

12. Breach of Contract.—Any failure to perform what is promised is a breach of contract, which will give the injured party the right to bring an action in which he will recover damages. In general, damages will be of such amount as to place him, so far as money can do it, in the same position as if the contract had been performed—subject, however, to the rule that damages are not to be given for losses of an extraordinary kind, such as the parties could not be presumed to have contemplated at the time of entering into the contract: *e.g.* a purchaser of goods who, unknown to the seller, has agreed to sell them again at a large profit, is not entitled, if the seller fails to deliver, to charge him with the loss of profit, but only with the difference between the contract price and the price at which other goods of the same kind might have been bought in the market when the breach occurred. In some cases the damages allowed by law are

merely nominal: for instance, for failure to pay a debt at the time agreed, nothing beyond the amount of the debt itself can in most cases be recovered. On the other hand, in the case of breach of promise of marriage, damages, which may far exceed the pecuniary loss, are given as a compensation for injured feelings. A contract sometimes provides that a certain sum shall be paid on breach, and rules have been laid down for determining whether such a sum is to be deemed a penalty, recovery of which will be refused, or is liquidated damages, *i.e.* represents a prospective assessment of the probable loss, and can be recovered. The decision will turn only to a slight extent on the question whether the expression "penalty" or "liquidated damages" has been used in the contract.

Negative duties under a contract may also be enforced by means of an injunction, an order of the Court forbidding the doing of an act. In certain cases a positive duty may be enforced by order for specific performance, a remedy which is almost confined to contracts for the sale or conveyance of interests in land, and for the transfer of other property which is so unique or rare that damages would be an inadequate remedy. The court has a discretion in granting an injunction and an order for specific performance, and in

exercising the discretion will have regard to all the circumstances of the case, and in particular to the conduct of the party asking for it. Non-compliance with an order of either kind will be punished by imprisonment.

13. The Termination of Contractual Rights and Liabilities.—Not to mention that the rights and duties which arise under a contract come to an end when they are satisfied by performance, we may notice that a contract will often expressly provide that its force shall cease upon the happening of a specified event. Further, it may appear from the terms of a contract that the parties contemplated the continuance of a state of things as the basis of it, and in such a case the obligations of the contract will cease as from the time when that state of things ceases. Contracts for personal service are thus dependent on the continued life and health of the person who has promised his services, and as a rule on the life of the employer. The principle was pushed to great lengths in the case of contracts for seats to view the coronation of King Edward vii which could not take place on account of the King's illness.

The failure by one party to perform his obligations under a contract does not necessarily release the other; but it may do so

where a condition to this effect is expressed or can be implied in the contract; where the failure amounts to a complete repudiation, or renders it impossible for the other to perform; or where it is so complete as to deprive the other of the whole substantial benefit of the contract.

An impossibility of performance created by a change in the law puts an end to duties under a contract. Other cases in which it is said that impossibility arising after the making of a contract puts an end to it, seem to fall under the principle above stated, which applies where the parties have contemplated the continuance of some state of things as the basis of it.

The parties may agree after the making of a contract, and even after its breach, to put an end to their rights and liabilities. Such an agreement is governed by the ordinary principles relating to the formation of contracts. It follows that where there are outstanding liabilities on both sides, a mutual discharge is good in whatever form it is made, because the discharge which each gives is a consideration for the discharge given by the other; where there is a liability on one side only, the other can give up his rights only by deed, or in return for some new consideration. If the right which is to be discharged is a

right of action for breach of contract, it is said that the consideration must be a performance and not merely a promise, and the right is then said to be discharged by "accord and satisfaction." The limits of this rule are obscure, but it seems clear that for the purpose of it the execution of a negotiable instrument is a sufficient performance.

The right of action for breach of contract is put an end to by the lapse of 6 years from the breach, in the case of a simple contract; 20 years in the case of a contract under seal; but claims for money secured by deed upon land are barred at the end of 12 years. The right of action for a debt may be kept alive or revived by a part payment or payment of interest, or by a written promise of payment or acknowledgment signed by the debtor. The period then begins to run afresh from the date of the payment or writing.

CHAPTER VII

TORTS

1. General Conditions of Liability.—While English law has developed a system of comprehensive rules relating generally to the formation, validity, and effect of contracts, and has laid comparatively little stress on the differences arising between various kinds of contracts from the nature of their subject-matter, it cannot be said that we have at present any systematic doctrine of liability for wrongs which are independent of breach of contract and trust. An account of the law of torts must consist largely of the enumeration and description of the principal specific torts which the law recognises. With regard to what is here said of the general conditions of liability for tort, it must be borne in mind that these general conditions are not in themselves sufficient to create a liability in respect of any act unless the act falls within some recognised head of tort

(*a*) *Intention.*—The consequences of an act may be said to be intended when the person

acting contemplates that they will necessarily or probably follow from it, whether that consequence be desired for its own sake or not. It is said that a man is presumed to intend the probable consequences of his acts, but failure to anticipate probable consequences is really negligence rather than intention, and if the saying is more than a rule of evidence for ascertaining intention, it only means that for some purposes negligence, no less than intention, creates liability.

Intention is the most general condition of liability for tort, since it is clear that while some torts cannot be committed unintentionally (*e.g.* fraud), any act which is a tort at all will be one if intentionally committed.

There has been in recent years some tendency to the formation of a rule that in the absence of just cause or excuse the intentional causing of damage involves liability, and the acceptance of this rule would amount to a general theory of liability, which would dispense in a number of cases with the necessity of inquiring whether a given act did or did not fall within some recognised head of tort. The doctrine cannot, however, be said as yet to have been accepted as part of our law; and since it is clear that in many cases the intentional infliction of damage is lawful (as in cases where one trader cannot

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(*a*) *Intention.*—The consequences of an act may be said to be intended when the person

(*d*) *Liability independent of intention or negligence.*—In some exceptional circumstances a person may incur liability for damage which is not intentionally caused by him nor due to any negligence on his part. Thus a person who creates a dangerous state of things upon his land, as by the construction of a reservoir, will be liable for damage resulting to others, if, for instance, the reservoir bursts, although he has used every precaution, unless the accident is due to the act of a stranger or to some natural event of extraordinary violence (an "act of God"), such as a flood caused by exceptional rainfall. The person who keeps a wild animal of a savage kind, or even a domestic animal which is known to him to be savage—for instance a dog which he knows to have bitten human beings—will be liable for damage done by it, whatever care he may have used to keep it safely. Further, a statutory liability has been imposed on the owner of a dog for damage done by it to animals, even if he had no knowledge of its propensity to do such damage. So, too, a man is liable for damage done to crops by his horses and cattle straying from his land.

The liability imposed by the Workmen's Compensation Act, 1906, on an employer for injury or death of his workman caused by an accident arising out of and in the course of

but we may notice the duty of persons who use vehicles upon the highway; the duty of owners of premises to prevent them from being a source of danger to those upon the highway, or to neighbours, or to persons who resort to them at the owner's invitation; the duty of persons who deliver goods to others to take care that they are free from danger, or, in some circumstances, to give warning of any known defect; the duty of persons to whom goods are delivered to be used or dealt with, to take care to prevent damage to them. The extent and degree of care necessary will vary according to the circumstances, but there is no sharp line of division such as is suggested by the use of such terms as "gross" or "slight" negligence.

Where a person has caused damage by negligence, but the person who suffers has himself been guilty of negligence which has contributed to the harm, the latter may be disentitled to relief on the ground of "contributory negligence." The rule appears to be that if both are at fault, but one had the last opportunity of avoiding the accident, he will be liable for any damage suffered by the other and disentitled to recover for any damage suffered by himself. Where it is impossible to apply this test it seems that neither can recover against the other.

(*d*) *Liability independent of intention or negligence.*—In some exceptional circumstances a person may incur liability for damage which is not intentionally caused by him nor due to any negligence on his part. Thus a person who creates a dangerous state of things upon his land, as by the construction of a reservoir, will be liable for damage resulting to others, if, for instance, the reservoir bursts, although he has used every precaution, unless the accident is due to the act of a stranger or to some natural event of extraordinary violence (an "act of God"), such as a flood caused by exceptional rainfall. The person who keeps a wild animal of a savage kind, or even a domestic animal which is known to him to be savage—for instance a dog which he knows to have bitten human beings—will be liable for damage done by it, whatever care he may have used to keep it safely. Further, a statutory liability has been imposed on the owner of a dog for damage done by it to animals, even if he had no knowledge of its propensity to do such damage. So, too, a man is liable for damage done to crops by his horses and cattle straying from his land.

The liability imposed by the Workmen's Compensation Act, 1906, on an employer for injury or death of his workman caused by an accident arising out of and in the course of

his employment, is another instance of liability independent of intention or negligence.

(*e*) *Damage and damages.*—In some cases the mere infringement of a right is itself a cause of action, though there may have been no pecuniary loss and not even any appreciable harm done, as in the case of trespass to land or goods. Here, if no actual damage is proved, and there are no circumstances of aggravation, such as insulting conduct, only nominal damages are recoverable. Somewhat different are the cases of injurious acts, such as libel or malicious prosecution, which are actionable without proof of any pecuniary loss, and for which heavy damages may be given, having regard not only to any pecuniary loss, but to the injured feelings of the plaintiff and the improper conduct of the defendant. Again, in the majority of cases of slander, no action lies, unless "special damage," in the sense of some pecuniary loss, is proved; but the damages recoverable are not limited to the amount of such "special damage." Lastly, in the case of a number of torts (*e.g.* deceit), proof of actual damage is both a condition of actionability and the measure of the damages recoverable.

Subject to the direction of the judge and the possibility of an appeal where the damages given are inconsistent with the evidence, the

amount of damages is determined by the jury. Where the continuance or repetition of a tort is threatened, it may be restrained by injunction.

2. Termination of Liability.—(*a*) *Death of either party.*—At Common Law, the death of either party put an end to claims in respect of a tort, and this rule applied even if the tort itself caused the death of the injured party. The only exception which the Common Law allowed to this rule was that the representatives of a deceased person might be sued for property which he had wrongfully appropriated. The following further exceptions have been made by statute :—(i) damages for injury to personal property of the deceased may be recovered by his representatives ; (ii) damages for injury to real property of the deceased may be recovered by his representatives, if the injury was committed within six months before the death of the deceased, and the action is brought within one year after the death ; (iii) where death is caused by a tort, an action for damages may be brought by or on behalf of near relations of the deceased who were dependent on him ; (iv) damages may be recovered against the representatives of a deceased person for injuries to real or personal property committed by him within six months

before his death, if the action is brought against his representatives within one year after they enter on office; (v) claims under the Workmen's Compensation Act, 1906, for injury or death may be brought against the representatives of a deceased employer.

(*b*) *Limitation of actions.*—In general an action of tort must be begun within six years of the commission of the tort, subject to the following exceptions:—

Actions for trespass to the person (*i.e.* assault, battery, and false imprisonment) must be brought within four years of the commission of the wrong. Actions for slander by words actionable without proof of special damage must be brought within two years. Actions against any person or body for any act or default done in execution or intended execution of an Act of Parliament (*e.g.* an action for personal injuries caused by the negligence of the London County Council in working its tramways) must be brought within six months. Claims to the possession of land must be brought within twelve years after the wrong-doer, or those under whom he claims, first took possession; but if the person in possession gives a written acknowledgment of the claimant's title before the period has elapsed, the period begins to run again.

3. Specific Torts.—(*a*) *Wrongs to personal*

safety and liberty.—"The least touching of a man in anger is a battery," and any direct application of force to a man's person, whether intentional or negligent, is an actionable wrong. The attempt and even the threat of immediate violence where there is something more than mere threatening language, and there is present power and intention to do violence—aiming a gun, for instance, or shaking one's fist in a man's face—is also actionable, and is known as an assault, a term which, in its strict legal sense, is distinguished from a battery.

Further, any intentional or negligent doing of actual harm to a man's person, though it may be indirect and not amount to a battery, is an actionable wrong, as where injury is done by placing an obstruction on a highway, or where a medical man does harm through want of care, care including the use of such skill as belongs to his profession. Where illness is caused by apprehension of harm—a person, for instance, is nearly but not quite run into by a negligent driver—damages may be recovered in respect of the illness, though not for the mere mental distress.

"Any restraint of the liberty of a free man is an imprisonment, although he be not within the walls of any common prison," and where such imprisonment is not legally justified it amounts to the wrong of false imprisonment.

The restraint must, however, be complete. There is no imprisonment if a person is prevented from going in one or more of several directions in which he has a right to go, so long as it is left open to him to go with reasonable safety in some other direction. Not only confinement or restraint by physical force, but the show of a pretended authority to arrest, if it is complied with, amounts to an imprisonment.

Interferences with a man's person or liberty are of course justified on many grounds. Parental powers of chastisement and coercion, —a husband has no such power over his wife, —the lawful punishment of criminals, the restraint of persons of unsound mind, are familiar instances. As regards the arrest of suspected criminals, we may note that it is the right even of a private person to arrest for felony without a warrant, but the right is exercised at considerable risk, for if the prisoner's guilt cannot be proved, the person who arrests him can only justify himself by showing not only that he had reasonable grounds of suspicion, but that a felony was actually committed by some one. A constable who makes an arrest in the like circumstances is justified by merely showing reasonable grounds of suspicion, and in other respects has considerably larger powers to arrest.

Consent to an act (*e.g.* the voluntary undergoing of surgical treatment, provided it is carried out with proper care and skill) and the voluntary incurring of risk, as in the case of those who engage in a lawful game, are of course defences to any claim on the ground of tort. In the relation of employer and workman, this principle has been pushed far by the presumption that the workman has voluntarily incurred certain risks incident to the employment. He is not entitled at Common Law to recover damages against his employer for injury caused either (i) by the fact that the employer's works, machinery, and appliances, which were proper when first provided, have since become unsafe, unless it is shown that they have become unsafe to the actual knowledge of the employer himself, and without the workmen's own knowledge; or (ii) by the negligence of any servant of the same employer and in the same employment. This does not, however, prevent an employer from being liable for his own negligence in failing to provide proper machinery and appliances, or in failing to superintend the work properly himself or to select proper persons to do so. The Common Law rule is still in force, and applies when any proceedings are taken by a workman against his employer outside the

Employers' Liability Act, 1880,[1] or the Workmen's Compensation Act, 1906.

(*b*) *Libel and slander.*—The publication of a defamatory representation is a libel, if it is made in writing or by some permanent sign, such as an effigy; it is a slander if made by word of mouth, or probably by such signs as gestures or the deaf and dumb language. A representation is defamatory either if it is made in respect of a man's personal character and is calculated to "hold him up to hatred, contempt, or ridicule," or if it is made in respect of his credit and fitness in office business, or profession, and is calculated to damage him therein.

Publication of a libel or slander consists in communicating it to any third person. In this connection the doctrine that for some purposes "husband and wife are one person" has been so applied that while a communication to the wife of the person whose reputation

[1] The Act of 1880 within somewhat narrow limits puts a workman in a position similar to that of an outsider in regard to injuries caused by defects in the works, machinery, and appliances, and by the negligence of certain of the master's employees, especially those charged with superintendence, but does not impose any liability in respect of injuries not due to the negligence either of the employer or of a fellow-servant. It has become of little importance since the introduction of a general liability of the master to make compensation. Both the Act of 1880 and that of 1906 impose a limit on the amount recoverable.

is attacked is a publication, communication to one's own wife is no publication. A publication may be made not only intentionally but negligently, as by putting a book into circulation without taking care to make sure that it contains nothing libellous.

The chief importance of the distinction between libel and slander lies in the rule that while a libel is actionable without any proof of "special damage," this is true of only a limited class of imputations made by way of slander, among which imputations of a criminal offence, of a woman's unchastity, and of incompetence, unfitness, or dishonesty in a man's business, office, or profession are the most important. Special damage means some loss which is pecuniary, or at any rate capable of being estimated in money, such as the loss of custom, or even loss of the hospitality (though not the society) of one's friends.

The proof of the substantial truth of a defamatory statement is a complete defence to any civil action brought in respect of it, and is known as "justification." This defence is, however, a dangerous one to bring forward, for it will fail if the defendant does not succeed in proving every material part of his allegations, and, in case of failure, the fact that the defence was attempted will incline the jury to give heavier damages.

In particular circumstances, a person is allowed with greater or less impunity to make defamatory statements, so as to incur no liability even if the statement is untrue. A defence founded on such a right is called the defence of privilege. Such privilege arises in numerous circumstances: the proceedings in Parliament; statements made in the course of judicial proceedings by judges, advocates, parties, and witnesses; reports of parliamentary and judicial proceedings; communications made in private li e in the furtherance of some recognised duty or interest—*e.g.* confidential communications by a former to an intending employer with regard to the character of the servant—are all privileged. In some cases the privilege is *absolute*, *i.e.* it is not lost even if it is shown that the statement was made with knowledge of its falsity, or for mere purposes of ill-will; this is true of the privilege given to statements made in Parliament or in a court of law. In other cases, especially where the privilege exists in private relations, it is said to be *qualified*, and is lost if the statement is shown to have been made with "actual malice," *i.e.* with knowledge of its falsehood, or from ill-will, or for any purpose not justified by the circumstances of the privilege.

Disparaging statements made by way of

fair comment or criticism on matters of public interest, *e.g.* the conduct of men in public positions, or published works of art or literature, also enjoy immunity. The defence of fair comment will not cover misstatements of fact, except so far as they are merely reasonable inferences from the facts on which the comment is based. Recent decisions seem to have assimilated the defence of fair comment to that of privilege, by holding that a criticism actuated by improper motives cannot be a fair comment, even though the same criticism might have been fairly made by a person who had no such motive.

An apology coupled with a payment of damages into court may be pleaded in some cases as a defence, and in any case by way of mitigation.

Statements (whether made in writing or otherwise) which are not attacks on a man's character or credit or competence, but which cause damage, *e.g.* by casting doubt on his title to property, or disparaging the quality of his goods, are not defamatory. Such statements, however, are actionable if they are shown to be false, to have been made with malice, and to have caused actual damage.

(*c*) *Abuse of legal proceedings.*—A person may recover damages for malicious prosecution, if he can show :—

In particular circumstances, a person is allowed with greater or less impunity to make defamatory statements, so as to incur no liability even if the statement is untrue. A defence founded on such a right is called the defence of privilege. Such privilege arises in numerous circumstances: the proceedings in Parliament; statements made in the course of judicial proceedings by judges, advocates, parties, and witnesses; reports of parliamentary and judicial proceedings; communications made in private life in the furtherance of some recognised duty or interest—*e.g.* confidential communications by a former to an intending employer with regard to the character of the servant—are all privileged. In some cases the privilege is *absolute*, *i.e.* it is not lost even if it is shown that the statement was made with knowledge of its falsity, or for mere purposes of ill-will; this is true of the privilege given to statements made in Parliament or in a court of law. In other cases, especially where the privilege exists in private relations, it is said to be *qualified*, and is lost if the statement is shown to have been made with "actual malice," *i.e.* with knowledge of its falsehood, or from ill-will, or for any purpose not justified by the circumstances of the privilege.

Disparaging statements made by way of

interference which consists of acts criminal or wrongful in themselves,—for instance, by using violence to his customers,—there is no doubt that an action will lie. The same is true where the damage is caused to a trader by a rival who puts goods on the market so got up as to mislead purchasers into thinking that they are purchasing the goods of the former.

But further, within limits which are not clearly defined, it would seem that an interference with trade or employment causing damage is actionable at Common Law, though the interference is carried out by means of acts which in themselves are not unlawful. At any rate, persons who, acting in combination, intentionally cause such damage (and perhaps any form of damage) are liable in the absence of just cause and excuse. Thus damages were recovered against members of a trade union, who, acting in combination in order to punish an employer for his refusal to dismiss a non-unionist, withdrew his workmen, and induced a purchaser of his goods to leave him, by withdrawing or threatening to withdraw the workmen of the latter. On the other hand, a mercantile combination which sought to crush its rivals by underselling them, by offering special advantages to persons who dealt exclusively with members of the combination, and by refusing

service must be proved. "Making tea," it is said, "has been held to be service." The damages recoverable are of course not limited to the value of the service or any actual expense incurred.

For the most part, however, the action for loss of service is practically superseded by the wider modern rule — not confined to contracts of service—that it is an actionable wrong for a third person to cause damage by knowingly interfering with contractual relations. It is said that there may be some just cause or excuse for such interference or inducement to break a contract: a person who, acting from conscientious motives and in discharge of a social or moral duty, induced a child or near relation to break off an engagement to marry would probably be excused, but it is clear that the motive of self-interest in a trader who induces the employee of a rival to change masters is no such cause or excuse. It is difficult to justify the complete exemption from liability for inducement of breach of a contract of employment which has been given by the Trade Disputes Act, 1906, in cases where such a breach is induced "in contemplation or furtherance of a trade dispute."

Where, without any breach of contract, damage is done to a man's business through

interference which consists of acts criminal or wrongful in themselves,—for instance, by using violence to his customers,—there is no doubt that an action will lie. The same is true where the damage is caused to a trader by a rival who puts goods on the market so got up as to mislead purchasers into thinking that they are purchasing the goods of the former.

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to employ agents who acted for the rivals, was held to be justified on the ground of legitimate trade competition, and a similar principle seems to justify a spontaneous strike or combination of workmen.

For the great majority at least of the cases which are likely to arise in practice, any liability for interference with trade or employment would seem to be removed, on the one hand, by the rule that commercial competition is a just cause and excuse; on the other, by the Trade Disputes Act, 1906, which has in effect put upon the footing of just cause and excuse the "contemplation or furtherance of a trade dispute." The exemption given by this statute applies where acts are done in combination which would have been lawful if done by persons acting without combination, or where an attempt is made to hold any person liable on the ground merely that his act is an interference with the trade, business, or employment of another, or with the right of another to dispose of his capital or labour as he wills.

(*e*) *Fraud.*—Fraud or deceit has already been dealt with as a matter vitiating a contract, and it has the same characteristics when considered as a tort. A person who sues for damage caused by fraud must show that he has suffered damage by acting on a

representation made with the intention that he should act on it; that the representation made was false, and that it was false to the knowledge of the person making it, or at least was made recklessly without any belief in its truth. The representation need not have been made directly to the person who acts on it, but it must have been made with the intention that it should reach him and that he should act on it.

It is only in exceptional cicumstances, as in the case of directors and others who issue the prospectus of a company, that any liability is incurred for a representation which is honestly believed in, but without sufficient or reasonable grounds.

(*f*) *Torts in respect of property.*—Trespass to property consists of any interference with property which is in the possession of another: entry upon land, causing missiles to fall upon it, posting bills on a fence (without the owner's consent), touching or damaging or removing goods, are all acts which amount to trespass. Even an entry on land below the surface, *e.g.* by mining, is a trespass; but though the ownership of land carries with it a right to restrain encroachments on the space above it, it is not clear that passing through the upper air is a trespass with regard to the land below.

Trespass is primarily an interference with possession. On the one hand, a person in

possession of property, whether land or goods, is entitled to resist and to sue any person who interferes with his possession and cannot show a better right to the possession. On the other hand, a person who is not in possession and has no present right to the possession—a reversioner of land, an owner of goods who has bound himself by agreement to leave the possession in the hands of another who has hired them for a definite time—cannot complain of a trespass as such, though he may he allowed to sue in a special form of action if he can show that his reversionary interest is damaged. The distinction is important, inasmuch as damage is not a condition of bringing an action of trespass. But a person who, though not in actual possession, is entitled to resume immediate possession, *e.g.* a gratuitous lender of goods, the landlord of a tenant at will, is equally entitled with the actual possessor to sue third persons for trespass.

An act which would otherwise be trespass may be justified if it is done by the consent of the owner, or in the exercise of a public or private right over the land. In the former case, a person who persists in remaining on the land or premises of another when the consent of the owner has been withdrawn becomes a trespasser, even if the consent was given under a binding agreement, though

the withdrawal of consent may be a breach of contract for which damages could be recovered. A right over land must not be used for other purposes than those for which the right exists: a man will be a trespasser on a public footpath if he goes there for the purpose of spying on the owner's adjacent premises or disturbing his game. An owner does not commit a trespass by taking his property from one who is wrongfully in possession of it, but the forcible retaking of land (but not of goods) is a criminal offence.

Not only is it a trespass to deprive an owner of any property of which he is in possession, or even to retain possession of land against the person entitled to it, but in the case of land it constitutes the wrong of dispossession, and in the case of goods is one of the forms of the tort known as conversion.

An owner wrongfully deprived or kept out of possession of land may bring an action to recover the land (sometimes called the action of ejectment), in which he will obtain an order for the restitution of the land itself as well as damages representing the value of the land for the time during which the wrongful possession has continued.

By conversion of goods is meant any act in relation to goods which amounts to an exercise of dominion over them, inconsistent with

the owner's rights. It does not include mere acts of damage, but it does include such acts as taking possession, refusing to give up on demand, disposing of the goods to a third person, or destroying them. A person who has converted the goods of another will be ordered to restore them, if they are still in his possession, otherwise to pay their value, and in any case to pay damages for the detention.

Though dispossession and conversion are regarded primarily as wrongs done to the owner, yet on the one hand a person who has not a present right to possession—*e.g.* a person whose estate in land is not a present but a future estate—is not entitled to sue for these wrongs: and on the other hand a man may have obtained possession from another in such a way, that though the latter is not the owner, the former will not be entitled to dispute his right. Thus a jeweller, to whom a chimney-sweep had handed for examination a jewel which he had found, was held liable to restore it to him, though it was obvious that the boy was not the owner.

Ignorance of another's rights is no defence to claims for trespass, dispossession, or conversion. A man who innocently buys goods from a thief (except in market overt) and sells them again must pay their value to the owner.

A private nuisance is an act which, without

being a trespass, interferes with a person in the enjoyment of his own land or premises, or of some right which he has over the land or premises of another. Thus it is a nuisance on the one hand to interfere with the comfort of a dwelling-house by the persistent production of noise, or fumes, or smells, to cause crowds to assemble so as to prevent access to a house or place of business, to divert or pollute the flow of water in a natural stream to which every owner of land abutting on it is entitled; on the other, to interfere with rights of light for windows or private rights of way, or rights of common. It should be noticed that a man has no right of light for his windows unless such a right has been acquired by grant or by long enjoyment, and therefore, in the absence of such a right, it is lawful to cut off light coming to a neighbour's window, by putting structures or buildings on one's own land.

A man has a right to have his land in its natural state supported by his neighbour's land, but if he erects buildings which need a greater degree of support, he can only acquire a right to it by grant or length of enjoyment. The withdrawal of a right of support, whether natural or acquired, is a nuisance.

It is a nuisance to allow the branches of one's trees to grow so as to overhang one's neighbour's land.

A person who suffers from a nuisance may remove it even without giving notice, if he can do so without going on to another's land, *e.g.* by cutting overhanging branches; otherwise it is said that he may do so after giving notice, but it would certainly be inadvisable to take such a step.

If an action for nuisance is brought, not only will damages be given, but the court may, and commonly does, grant an injunction forbidding its continuance and even ordering an offending structure to be pulled down.

A public nuisance is an unlawful act or omission which causes annoyance to the public generally, such as obstructing a highway, or (where there is a duty to repair) failing to repair it, or allowing rubbish and filth to be deposited on one's land to the annoyance of the neighbourhood. For a public nuisance no individual can sue unless he suffers damage peculiar to himself, as by breaking his leg through falling into a hole in the road. A public nuisance is, however, punishable as a misdemeanour, and the Attorney-General may take proceedings to obtain an injunction forbidding its continuance. Local authorities also have power to take proceedings to put a stop to public nuisances. A private person may remove an obstruction on a public way, but he may not repair a public way or bridge.

CHAPTER VIII

CRIMES

1. Sources of Criminal Law. — Our Criminal Law is almost entirely Common Law with large statutory additions and modifications and some attempts at consolidation or codification by statute. Equity never had anything to do with Criminal Law; and the Star Chamber, which in some ways bore the same relation to the Common Law Courts on the criminal side as the Chancery had to the Common Law Courts on the civil side, has long since disappeared, and with it its attempts to create new forms of criminal liability. Perhaps we owe to it the punishment by the Common Law Courts of some crimes, such as perjury, not known to the older Common Law. Piracy, which is practically robbery committed against a ship at sea, and which was at one time punished by the Admiralty Court, has also been taken up into the Criminal Common Law.

2. Civil and Criminal Law contrasted. —The difference between Civil Law (which has formed the main subject of the previous

chapters) and Criminal Law turns on the difference between two different objects which the law seeks to pursue—redress or punishment. The object of civil law is the redress of wrongs by compelling compensation or restitution: the wrong-doer is not punished, he only suffers so much harm as is necessary to make good the wrong he has done. The person who has suffered gets a definite benefit from the law, or at least he avoids a loss. On the other hand, in the case of crimes, the main object of the law is to punish the wrong-doer; to give him and others a strong inducement not to commit the same or similar crimes, possibly to reform him, possibly to satisfy the public sense that wrong-doing ought to meet with retribution. But this punishment is not directly or mainly beneficial to the person injured. If a fine is imposed it goes to the State; if the criminal is imprisoned or put to death the injured man or his relations may feel some satisfaction, but the satisfaction of their feelings ought not to be regarded as the object of the punishment. In all cases of crime the law treats the wrong-doing as not merely an injury to an individual, but as a matter of public concern. An individual suffering civil injury need not sue the wrong-doer, and may contract not to sue him. Where a crime has been com-

mitted, the person injured cannot prevent proceedings being taken to secure punishment, and an agreement not to prosecute is a criminal offence. Criminal proceedings are taken in the name of the King as representing the State, and every citizen has a right to set the law in motion, whether he has been injured or not, and public officers exist to set the law in motion where necessary. The King can pardon crimes after conviction, and, except in the case of a trial by impeachment, even before conviction; but the King cannot pardon a civil wrong done to a private person, so as to deprive him of his remedy. So, again, the King can, through the Attorney-General, stop a criminal prosecution, but he cannot stop a civil action.

Many crimes may be committed without giving any one a right to bring a civil action: *e.g.* treason, and forgery where no one has been defrauded, so too perjury. On the other hand, many or most civil wrongs are not crimes: *e.g.* trespass where no wilful damage is done is no crime, and the notice that "trespassers will be prosecuted" has been well described as "a wooden falsehood."[1] In some cases, however, the same act is both a crime and a civil wrong, as in the case of

[1] Maitland, *Justice and Police*, p. 13. This and the two following sections owe a great deal to Maitland's chapter on "Civil and Criminal Justice."

injuries to the person and defamatory libel, and in general it may be said that any criminal act which causes damage to an individual is civilly actionable. In such cases both civil and criminal proceedings may, with some exceptions, be taken for the same act: it is not necessary to choose between the two, but the proceedings are quite distinct. Only in some exceptional cases can punishment and redress be obtained in the same proceedings; thus for instance in the case of a prosecution for theft, the court which convicts may order the restitution of the goods to the owner; judicial separation may be obtained in proceedings by a wife against her husband on the ground of aggravated assault; so, too, in the case of petty offences the magistrates may order the guilty party to pay damages up to 40s. instead of punishing him.

3. Classification of Crimes and Offences. — Criminal offences may be broadly divided into two main classes: indictable offences, and offences punishable on summary conviction before magistrates. In cases of the former class (which in general comprises the more serious offences), the accused is *indicted* by a grand jury which decides on *prima facie* evidence whether there is any case at all against the prisoner; if they decide that there is not, they are said to

"throw out the bill." This, however, is not an acquittal, for he may be again indicted; it only means that they refuse to accuse him. If, as happens in the great majority of cases which come before the grand jury, a "true bill" is returned, the trial takes place before a judge or commissioner at the Assizes or before a Court of Quarter Sessions, in any case with a petty jury; the latter, subject to the right of the accused to appeal, finally decides whether he is guilty or not. If they bring in a verdict he can never be tried again for the same offence. In practice the process of indictment is preceded by an inquiry before a magistrate, or magistrates, who decide whether there is sufficient evidence to send the case for trial, and the procedure before the grand jury has thus come to be very much a matter of form. The decision of the magistrate is, of course, not conclusive either for or against the accused. In a certain number of cases of the less serious indictable offences the magistrates have now a power, with the consent of the accused, or, if he is under age, of his parent or guardian, to try and decide finally the whole case and inflict punishment but there is a limit to the amount of punishment which they can impose in such a case. And no one can be deprived of his right to be tried by a jury in such cases against his will.

Indictable offences are classified in a way which corresponds only roughly to the seriousness of the offence. At the head we have the offence of treason, which stands in a class by itself. Other indictable offences are divided into felonies and misdemeanours. At a time when felonies, with one exception, were punishable with death, and in any case involved forfeiture of the felon's property, the distinction was one of great importance; at the present day felonies are still distinguished from misdemeanours in a number of points. The power to arrest without a warrant is even now more extensive in the case of felony than in that of misdemeanour. A person accused of felony is not, whereas a person accused of misdemeanour as a rule is, entitled to bail as of right; the procedure at the trial differs, and a rule, of which the extent and application are uncertain, forbids a person who has suffered damage by an act which amounts to a felony from taking civil proceedings until the offender has been convicted. Felonies include most but not all of the more serious offences: murder and manslaughter, theft or larceny, in the strict sense of the word, embezzlement (which is often very hard to distinguish from theft), bigamy, and some kinds of forgery. Misdemeanour includes some very serious crimes: *e.g.* assaults on the King, riots, bribery,

perjury, blasphemous, seditious and defamatory libels, obtaining by false pretences, some kinds of forgery, and many serious frauds. Misdemeanours, however, include even offences which popularly would hardly be called crimes at all: a man or a body which is under a duty to repair a highway or a bridge and neglects to do so commits a misdemeanour, which will be tried by the same procedure as, for instance, perjury. Generally speaking, however, the offences which involve little, if any, moral blame are not misdemeanours, but are punishable on summary conviction.

In the cases of offences punishable summarily the magistrate or magistrates decide the whole case without a jury, and impose the punishment. This class includes a great number of minor offences: petty assaults, petty forms of dishonesty, *e.g.* travelling on a tramcar with the intention to avoid payment of the fare, cruelty to animals, failure to send one's children to school, riding a bicycle at night without a lamp, and so forth. In the more serious of these cases, where the accused is liable to imprisonment for more than three months, he has a right, if he chooses to insist on it, to be tried by indictment, *i.e.* have trial by jury.

4. Penal Actions.—There are some ex-

ceptional cases where the proceedings are in form civil, but in substance criminal, *i.e.* intended mainly to secure punishment and not redress. Proceedings of this kind are called *penal* actions. The reason why these actions are allowed is mainly historical. At one time the King's power to pardon crimes or to stop criminal proceedings was largely used to protect wrong-doers who were supposed to be acting in the King's interest, *e.g.* public officers who were breaking the law. In order to prevent an offender of this kind from escaping punishment, Acts of Parliament would provide, not that he might be indicted and tried like a criminal, but that an individual, or individuals, should have the right to bring an action of debt against him for a sum of money. In some cases this action was given to the "party grieved," *i.e.* to any one wronged by the breach of duty, and in such cases the penalty would serve the double purpose of compensation, though it might be out of all proportion to the wrong done, and also of punishment; still, the main object was to secure punishment. Thus the Habeas Corpus Act provides heavy money penalties against all who offend against its provisions: *e.g.* judges who refuse to issue the writ, officers who send a prisoner out of England. The right to the penalty is a

private right, enforceable like any debt; and the King has no power to pardon, at any rate, after the proceedings have been commenced. In other cases the right of action is given to the "common informer," that is, any member of the public who chooses to take proceedings; in others, again, to some corporation which represents professional interests, such as the Law Society or the Goldsmiths' Company.

5. General Principles. — The Criminal Law consists for the most part of the definition (often elaborate and even verbose, especially when Statute Law intervened) of the conduct which is necessary to constitute a crime. and the number of species and varieties of crime is so large that no detailed account is here possible, nor would a bare enumeration serve any useful purpose.

There are some immoral and dishonest acts which, whether for good reasons or bad, incur no punishment; but in general the prohibitions of the criminal law correspond with the moral sense of the community, and with few exceptions crimes are acts from which every man knows that he ought to refrain. It will be enough to say something of the general principles of liability, and to deal with a few points of interest in connexion with particular crimes.

In general the law punishes only acts and not omissions. The cases where an omission to perform a legal duty amounts to a crime arise chiefly in connection with homicide, and will be dealt with under that head. Further, an involuntary act, such as that of a person walking in his sleep, involves no criminal liability. An act done under compulsion or under stress of necessity is still a voluntary act, and it is only in extreme cases that necessity or compulsion can be pleaded as a defence to a criminal charge. It was held that shipwrecked sailors who killed a boy in order to preserve their lives by eating his body were guilty of murder. Coercion by threats of instant death or grievous bodily harm may excuse participation in a crime. The presumption or fiction of coercion of a wife by her husband has already been mentioned. It is hardly necessary to say that the fact that an act is done from a sense of moral or religious duty is no defence.

Ignorance that an act is criminal is no excuse. In some cases, however, the definition of a crime requires that the offender should know that he is violating some private right, and here ignorance even of a general rule of law may be material. Thus the taking of another's goods is no offence (though it is a civil wrong) if it is done in assertion of a

supposed right. Ignorance of fact, on the other hand, is to a very large extent a complete defence. A person who acts in the honest and reasonable belief that facts exist which would make his act entirely innocent, incurs no liability in the case of all the more serious crimes. A woman who married, honestly and on reasonable grounds believing that her first husband who had left her was dead, was held not guilty of bigamy, although he had not been absent for seven years, in which case she would have been expressly protected by statute. On the other hand, where a crime is so defined by statute that some circumstance is an essential part of it, the question may arise whether the intention was to punish the act whenever accompanied by the circumstance specified, or only when done with knowledge of the circumstance. To pass false money unwittingly is no offence;[1] to sell adulterated food is an offence, though one believes it to be unadulterated. In some cases it seems to be material that the act, even if done in the circumstances supposed by the prisoner to exist, would have been criminal or illegal, and perhaps even that it would have been immoral.

The word "maliciously," which often occurs in the definition of crimes against

[1] This is indeed expressly provided by statute.

property, means no more than that the act must be done intentionally and without justification or excuse or claim of right. Malice in connexion with criminal libel has the same meaning as in the law of torts. The meaning of "malice aforethought" in relation to homicide will be discussed later.

Something has already been said as to principals and accessories before the fact. They are all equally punishable. An accessory after the fact is one who knowingly receives, comforts, or assists a felon in escaping punishment. Such an accessory is liable in all cases to a maximum punishment of two years' imprisonment, except that in the case of murder the maximum is ten years' penal servitude. In treason, all parties to the crime (even one who in other crimes would be an accessory after the fact) are treated as principals. In misdemeanours there can be no accessory after the fact, but others participating in the crime are treated as principals.

The law punishes not only crimes actually committed, but also steps towards the commission of a crime which may never be completed. Such steps are incitements, attempts, and conspiracies. It is impossible to define precisely how closely an act must be connected with an intended crime to constitute an attempt. In practice little

difficulty seems to arise. Procuring dies for the purpose of coining false money is an attempt to commit that crime; buying a pistol in order to commit a murder would not be an attempt to murder. It is now settled that an act may be an attempt, though the commission of the crime was from the beginning impossible, *e.g.* there may be an attempt to steal from an empty pocket.

Any agreement between two or more persons to commit a crime is a conspiracy, but an agreement may under certain conditions be a conspiracy, even though the act agreed to be done is not a crime at all, but merely a civil wrong, a breach of contract involving serious public mischief, or even an act not illegal but grossly immoral or publicly injurious. The limits of the offence of conspiracy to do acts not in themselves criminal are ill-defined, but it is now declared by statute that a combination to do any act in contemplation or furtherance of a trade dispute is not indictable as a conspiracy unless the act would be punishable as a crime if done by one person alone.

6. High Treason.—Of the forms of High Treason defined in the Treason Act, 1351, only three are now of practical importance: "Compassing or imagining the King's death," "levying war against the King in his

realm," and "adhering to the King's enemies in his realm, by giving them aid and comfort in the realm or elsewhere." These words have been overlaid by a mass of judicial interpretation, the effect of which has been to convert treason from being mainly a breach of personal allegiance into a crime against the security of the State. With regard to the first of these, the "imagining" which seems at first sight a mere matter of intention, must, as is shown by the words of the statute itself, be proved by "open deed," which includes writing and printing, but not mere spoken words, unless they are spoken in furtherance of the intention which they express. It is settled that to constitute imagining the King's death it is sufficient if there is an intention to depose, or even an intention to levy war against the King, or to incite foreigners to invade the King's dominions.

"Levying war" again has been extended by judicial interpretation so as to include insurrections against the Government, insurrections intended to intimidate Parliament, and even insurrections for any general public object (*e.g.* in the eighteenth century it was held treason to cause an insurrection for the purpose of destroying all dissenting meeting-houses).

The offence can only be committed by a British subject, or by an alien who is for the

time being in the King's dominions and under his protection. A British subject cannot obtain immunity to fight against his country, by becoming naturalised in a hostile state when war has broken out or is on the point of breaking out.

Many of the interpretations put upon the statute were highly artificial, and had the result, especially at the end of the eighteenth century, of inducing juries to acquit the accused rather than find them guilty of an offence for which the only punishment was death, and, until 1814, death accompanied at least nominally by barbaric cruelties. Consequently some of the less serious forms of treason (though still punishable as such with death) have been constituted felonies punishable with a maximum penalty of penal servitude for life.

During the last quarter of a century only one prosecution for treason (arising out of the South African War) has taken place in this country. The prisoner was found guilty and sentenced to death, but the sentence was commuted, and at a later time the prisoner was released.

7. Unlawful Assembly and Riot.—An unlawful assembly is an assembly of three or more persons who meet with the intention of committing a crime likely to involve violence, or of carrying out any common purpose

(lawful or unlawful) in such a manner as to afford reasonable grounds for apprehending a breach of the peace. But if the object of the meeting is lawful there must at least be something violent or provocative in its conduct. An entirely peaceable procession of Salvationists was held not to become an unlawful assembly, because a band of roughs calling themselves the Skeleton Army intended to make, and in fact did make, attacks upon it.

A riot is an unlawful assembly which has begun to execute its common purpose by a breach of the peace and to the terror of the public.

Unlawful assemblies and riots are misdemeanours punishable by fine and imprisonment, in the latter case with hard labour. But under an Act of 1715, if twelve or more persons continue "unlawfully, riotously, and tumultuously assembled together" for more than an hour after a proclamation in words prescribed by the Act has been made by a sheriff or magistrate, they are guilty of felony, and incur a maximum punishment of penal servitude for life. The same penalty attaches to persons obstructing those whose duty it is to make the proclamation.

It is sometimes thought that no forcible measures to suppress a riot can be taken until the proclamation has been made and

an hour has elapsed. This however is a mistake. The statute no doubt gives an indemnity to those who, after the time has elapsed, use force in dispersing or arresting the rioters, even if some innocent person is unavoidably killed or injured. But the taking of all necessary steps, even to the shedding of blood, for the preservation of the peace, is both a matter of right and of duty at all times; and while the duty is one specially incumbent on magistrates and constables, they may require every citizen, and for this purpose soldiers are but citizens, to lend them assistance; in the absence of such officers the duty may fall directly on private persons present.

8. LIBEL.—A seditious libel is one calculated to bring into hatred or contempt or to excite disaffection against the King, the Government and Constitution, either house of Parliament, or the administration of justice; to excite the King's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established; to raise discontent or disaffection, or to promote feelings of ill-will or hostility between different classes.

The definition is a wide one, but the fact that the decision whether anything published is or is not a seditious libel rests with the jury prevents a Government from using the

law for punishing expressions of opinion which meet with any considerable degree of approval among the classes from which juries are mainly drawn. And it is clear that an honest criticism or statement of errors committed by the Government or of evils in the constitution with a view to their reform or removal by lawful means is not seditious.

The speaking of seditious words is equally punishable with the publication of a seditious libel.

There is considerable uncertainty as to the definition of blasphemous libel. According to one view, blasphemy consists not only of offensive attacks on the Christian religion, its sacred books, and the formularies of the Church of England, but includes even a denial of the truth of Christianity or of the existence of God, however serious and decent in expression. According to another view, which was acted on in all the cases that have arisen during the last sixty years, there is no blasphemy unless the expressions used are intended to outrage the feelings of believers, to bring the Church into hatred and contempt or to promote immorality. Since 1908 there has been some revival of prosecutions for blasphemy, which at one time seemed likely to fall into abeyance.

Spoken words which are blasphemous are equally punishable.

For purposes of Criminal Law, defamatory libels include not only libels which would be actionable as torts, but also libels on the character of deceased persons, if intended to wound the feelings of the living. Further, a libel is sufficiently published to be criminally punishable if communicated merely to the person whose character is attacked.

The proof of the truth of a defamatory libel affords no defence to a criminal prosecution unless it is also shown that the publication was for the public benefit. The defences of privilege and of fair comment are as available in a criminal prosecution as in a civil action.

The speaking of words which would be actionable as slander is not a criminal offence.

All forms of libel are misdemeanours, and punishable by fine and imprisonment.

9. Murder and Manslaughter.—Murder and manslaughter are the two forms of unlawful homicide.

The taking of life is unlawful whenever it is done by an act which is intended, or is known to be likely, to cause death or bodily harm, unless the act can be justified on special grounds, such as the execution of a lawful sentence, the prevention of crime and the arrest of offenders, or the right of self-defence, the limits of which are somewhat narrowly

defined. On the other hand, there is no general duty to preserve life.

> "Thou shalt not kill, but needst not strive
> Officiously to keep alive,"

is generally true in our law. A man who, seeing another struggling in the water, stands by and lets him drown, when he might have saved him by throwing a rope, is guilty of no crime. It is only when a man is guilty of culpable negligence in failing to carry out a legal duty tending to the preservation of life that he is guilty of unlawful homicide, if death ensues in consequence of his omission. The duty may be one imposed by contract (as in the case of a railway signalman) or by a special relation between the parties (as in the case of a parent's duty to provide for children too young to provide for themselves), or it may be a legal duty to take precautions in doing an act which is dangerous if precautions are omitted (*e.g.* the duty of a motorist to give audible warning of his approach).

It is still the rule that an act which causes death is not homicide if the death occurs more than a year and a day after the commission of the act.

Murder is distinguished from manslaughter by the presence of "malice aforethought"; but this phrase has nothing to do with malice in any ordinary sense, and killing may

be murder without any premeditation. What is really meant is that an unlawful act or omission which causes death amounts to murder if it is accompanied by an intention to kill or cause grievous bodily harm (whether to the person killed or another), or by knowledge that it will probably cause death or grievous bodily harm. It is sometimes added that the mere intention to commit any felony or to oppose forcibly an officer of justice when engaged in arresting or imprisoning an offender will make killing murder; but the authority for this is doubtful.

Even an act accompanied by such intention or knowledge will be not murder, but manslaughter, if it is done by a man in the heat of passion caused by provocation (not sought or provoked by him), which deprives him of the power of self-control. Insulting words and gestures in themselves do not amount to provocation.

Suicide is murder: it follows that if two persons agree to commit suicide together, and only one of them succeeds, the survivor is guilty of murder.

The only sentence which can be passed for murder is that of death, but on special grounds the sentence is sometimes commuted; manslaughter is punishable with a maximum of penal servitude for life.

10. Offences against Property. — The

law relating to offences against property is an extraordinary tangle made up of common law rules which still reveal their primitive character overlaid by piecemeal legislation.

The core of this branch of the law is the common law crime of larceny or theft. It involves, as its essential elements, a violation of possession of goods and an intention to "convert," *i.e.* permanently to deprive the owner or possessor. It followed that a person who had lawfully come into possession of a thing (*e.g.* by borrowing it) could not steal it; but misappropriation under such circumstances is now made equivalent to theft by statute. Even now a finder of goods cannot steal them unless at the time of finding he believes that the owner can be discovered, and then and there determines to misappropriate. If, however, a thing is obtained wrongfully, though by an innocent mistake—*e.g.* by driving away one sheep belonging to another with one's own flock—a subsequent misappropriation amounts to theft. Since goods received by a servant from his master for the master's purposes are deemed to be in the master's possession, while those received by him for the master from a stranger are deemed to be in the servant's possession, a misappropriation by the servant is a theft in the former case, but not in the latter,

though it now constitutes the statutory crime of embezzlement.

When a person intending to misappropriate goods, fraudulently induces the owner to give him merely the possession and then misappropriates, he commits theft, as when a person gets goods pretending that he is the carrier sent to fetch them away; but if he fraudulently induces the owner to part with the ownership—*e.g.* induces a man to give money for sham diamonds, pretending that they are genuine—he commits not theft, but the statutory offence of obtaining by false pretences.

Land cannot be stolen. At Common Law things forming part of the soil, or built upon it, or growing out of it, could not be stolen by merely severing them; nor could title-deeds of land, or securities for money, or dogs be stolen. But misappropriations of these things are now punishable by statute. Wild animals, unless in a state of captivity, cannot be stolen; but the unlawful pursuit and taking of game and rabbits is by statute punishable with considerable severity.

It is only by statute that one co-owner can steal the common property.

Simple larceny is punishable with a maximum of five years' penal servitude; but aggravated forms of it—*e.g.* stealing from the person and robbery, as well as stealing certain

kinds of things, such as horses—are punishable much more severely. On the other hand, many offences which are made criminal only by statute are much more lightly punished; thus the theft of a dog involves no more than six months' imprisonment, whereas the theft of its collar is punishable as a Common Law larceny.

Frauds and misappropriations by agents, trustees, directors, and officers of companies and corporations are statutory offences. Forgery is making a false document with intent to defraud. The maximum punishment is in some cases seven years', in others fourteen years', penal servitude, in others penal servitude for life. Wilful and malicious injuries to property, whether land or goods, are punishable with various degrees of severity, ranging downwards from the burning of ships of war and Government dockyards (for which the punishment is still death) to such acts as trampling down grass standing for hay (for which the maximum punishment is two months' imprisonment and hard labour or a fine of £5).

Breach of contract is very rarely punishable; it is, however, a crime for workmen to break their contracts of service where the probable consequence will be to endanger life or valuable property, or to deprive a place of its supply of gas or water.

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